



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** Minotaur Engineering

**File:** B-159326

**Date:** March 16, 1995

James G. Morris, Esq., Morris & Associates, for the protester.  
William E. Thomas, Jr., Esq., Department of Veterans Affairs, for the agency.  
Jacqueline Maeder, Esq., Robert Arsenoff, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that the terms of an invitation for bids provide an improper competitive advantage to the incumbent which had been improperly awarded the predecessor contract is denied where the incumbent did not obtain any information under that contract which provided an inappropriate competitive advantage, nor acted improperly in order to obtain the contract.

### DECISION

Minotaur Engineering protests the terms of invitation for bids (IFB) No. 829-7-95 issued by the Department of Veterans Affairs (VA) for an interactive voice response system for the VA Medical Center, New Orleans. Minotaur alleges that the IFB provides the incumbent contractor with an unfair competitive advantage which results from its performance of a prior improperly awarded contract.

We deny the protest.

This is the second protest filed by Minotaur concerning the VA's procurement of the same interactive voice response system. The first protest concerned the issuance of a purchase order to Televoice, Inc. for these services utilizing the small purchase procedures set forth in Federal Acquisition Regulation (FAR) part 13. After Minotaur learned of that purchase order 11 months after its issuance

<sup>1</sup>An interactive voice response system is a computer response system attached to "800" number telephone lines.

and 1 month before the contract was complete, the firm filed its first protest with our Office, alleging that VA did not properly compete the requirement. We sustained that protest and awarded protest costs to Minotaur because the VA had failed to post any notice or solicit potential offerors other than Televoice, as required by FAR §§ 5.101(a)(2) and 13.106(b). Minotaur Eng'g, B-258367, Jan. 11, 1995, 95-1 CPD ¶ \_\_\_\_\_. Additionally, the agency took corrective action by counseling and training the purchasing agent and suspending the purchasing agent's contracting authority for 30 days.

On October 12, 1994, while the first protest was pending, the VA issued the present solicitation as a follow-on procurement for these services at the same facility. In its second protest, Minotaur contends that the incumbent has an unfair competitive advantage in a simple price competition under the IFB due to the cost savings derived from the incumbent's performance of the improperly awarded contract. Specifically, Minotaur argues that because Televoice was paid by VA to perform the work previously, the firm has already developed the interactive voice response system (including the hardware, software, configuration, and installation required by the solicitation) and, thus, will not have to take into account certain "up front developmental" costs in formulating its bid under the IFB at issue.

Minotaur contends that the IFB should be amended to give all bidders other than Televoice a "cost credit" to equalize the competition by eliminating the incumbent's improperly obtained advantage. We disagree.

Our Office has recognized that, while contracting agencies are not required to eliminate an incumbent contractor's inherent competitive advantage in the evaluation of proposals it is appropriate to level the competitive playing field where the competitive advantage that the incumbent enjoys has resulted from preferential treatment or unfair action by the government. KPMG Peat Marwick, 73 Comp. Gen. 15 (1993), 93-2 CPD ¶ 272, aff'd on recon., Agency for International Dev.; Development Alternatives, Inc.--Recon., B-251902.4; B-251902.5, Mar. 17, 1994, 94-1 CPD ¶ 201. However, we have only required such equalization in the context of a negotiated procurement, and the usual remedy is to require dissemination to all competitors of information which could provide a competitive advantage which had been obtained by an incumbent under an improperly awarded contract.

We do not believe that the same considerations generally obtain under an IFB. Normally, in an IFB context, as here, the incumbent has not gained unique access to any

information which provides a competitive advantage, and which could be disseminated to equalize competition. As to the alleged "paid-for" development costs in this case, these were not, in fact, reimbursed costs. Televoice received a fixed-price contract to provide certain services, in conjunction with which Televoice incurred certain developmental costs. There is no way of knowing how, or whether, Televoice priced these costs in arriving at its bid price, and there is no basis to conclude that Televoice was reimbursed for these costs.

Under these circumstances, we question the appropriateness of recommending that an agency impose an evaluation cost credit under this--or any--IFB. Our reluctance is bolstered by the fact that, by statute, an agency must award under an IFB to the low-priced, responsible, responsive bidder. 41 U.S.C. § 253b(c) (1988); Alamo Contracting Enters. Inc., B-249265.2, Nov. 20, 1992, 92-2 CPD ¶ 358. Adding an evaluation cost credit, which does not reflect any actual agency cost, could result in award to other than the low-priced, responsible, responsive bidder. Further, a cost credit directed against Televoice, or a remedy such as eliminating Televoice from the competition, would impose an undue hardship on Televoice because its alleged competitive advantage is not the result of any improper action by Televoice. KPMG Peat Marwick, supra. Accordingly, we find no basis to object to the terms of the IFB.

The protest is denied.

\s\ Paul Lieberman  
for Robert P. Murphy  
General Counsel